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No. 08-322

In the
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE STATES OF NORTH CAROLINA, ARIZONA, CALIFORNIA, LOUISIANA, MISSISSIPPI AND NEW YORK AS AMICI CURIAE IN SUPPORT OF ERIC H. HOLDER, JR., ET AL.

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INTEREST OF AMICI CURIAE

Sixteen States are covered in whole or in part by the provisions of Section 5 of the Voting Rights Act. 42 U.S.C.A. § 1973c (West Supp. 2007); 28 C.F.R. pt. 51, app. (2008). Each of the Amici States is among the group of sixteen States that must comply with Section 5. The Amici States represent over half of the minority population residing within the States impacted by Section 5.

The Amici States and their political subdivisions have several decades of experience in submitting preclearance requests with the United States Department of Justice. Additionally, many of the Amici States have appeared before this Court as litigants in actions involving preclearance issues. *See*, *e.g.*, *Lopez v. Monterey County*, 525 U.S. 266 (1999)*; Shaw v. Reno*, 509 U.S. 630, 634-36 (1993); *United Jewish Org. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977). Thus, the Amici States have a direct and practical understanding of the costs and benefits of Section 5, including the impact that Section 5 has on our dual system of sovereignty.

The Amici States recognize that Section 5 of the Voting Rights Act has allowed our Nation to make substantial progress toward eliminating voting discrimination. More, however, remains to be done. The Amici States urge this Court to uphold the constitutionality of the 2006 Reauthorization of the Voting Rights Act. Any assertion that Section 5 constitutes an undue intrusion on state sovereignty does not withstand scrutiny. Section 5 does not place an onerous burden on States. States have been able to comply with Section 5 without undue costs or expense.

More importantly, Section 5 has produced substantial benefits within the Amici States and our Nation as a whole.

Congress acted appropriately in reauthorizing the Voting Rights Act in 2006. The Amici States respect and agree with Congress' determination to do so. The Amici States believe that the elimination of Section 5, as urged by Appellant, would undermine the progress that has been made under the Voting Rights Act.

SUMMARY OF ARGUMENT

Appellant argues that Section 5 of the Voting Rights Act constitutes a "severe intrusion on state sovereignty." Appellant's Br., p. 42. The preclearance requirements of Section 5, as those requirements have been applied and administered, however, do not constitute a significant intrusion on States and their political subdivisions. Appellant's argument that Section 5 should be struck down as an affront to federalism is without merit.

The preclearance requirements of Section 5 do not impose undue costs on covered jurisdictions. Administrative preclearance is expeditious and cost-effective. The process is neither difficult nor complicated. Rather, Section 5 preclearance is one of the most streamlined administrative processes within federal government.

Most preclearance submissions can be completed within a relatively short period of time. Moreover, even with respect to complicated submissions (such as

redistricting and annexation), the amount of work necessary to prepare the submission is but a small fraction of the time required to make the election law change in the first place. As a result, the monetary cost of making preclearance submissions is not significant.

Although the preclearance process does result in a minimal delay in the effective date of some state election law changes, such delays are not long and do not constitute a burden on States. The preclearance process in general is swift. The regulations governing Section 5 preclearance place a 60-day deadline on the United States Department of Justice to act on preclearance submissions.

In contrast to the minimal burdens of Section 5, the preclearance process affords covered jurisdictions real and substantial benefits. First, the preclearance process encourages covered jurisdictions to consider the views of minority voters early in the process of making an election law change. This involvement has minimized racial friction in those communities. Second, the preclearance process has helped covered jurisdictions in identifying changes that do in fact have a discriminatory effect, thus allowing them to prevent implementation of discriminatory voting changes. Third, preclearance prevents costly litigation under Section 2. Preclearance provides an objective review of a State's election law changes. That review process tends to diminish litigation challenging election law changes.

Congress acted appropriately in extending the provisions of Section 5. The remedy enacted by Congress is congruent and proportionate to the harm that Congress sought to address, particularly given the minimal burdens and substantial benefits of Section 5. Appellant's efforts to attack Section 5 under the guise of federalism ring hollow.

ARGUMENT

The Amici States share the view of the United States and the intervenors that the Voting Rights Act is one of the most important legislative enactments in our Nation's history. This Court should not jettison the unbroken line of cases upholding the constitutionality of Section 5 of the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999). The gains that have been made under the Voting Rights Act are susceptible to being lost if this Court were to strike down Section 5.

This amicus brief does not attempt to repeat the arguments of the United States and intervenors. Rather, it focuses on the unique perspective of the Amici States as jurisdictions impacted by Section 5. Specifically, the Amici States respond to the Appellant's argument that Section 5 is a significant affront to the sovereignty of the States. *See*, *e.g.*, Appellant's Br., p. 54. It is not. In response to Appellant's assertion that Section 5 is not congruent and proportional to the harm that Congress sought to

address through this legislation, the Amici States wish to make two points. First, Section 5 does not place an onerous burden on covered jurisdictions. The cost of compliance is relatively small. Second, the preclearance process substantially benefits and assists States by encouraging greater minority participation in election law changes and by helping covered jurisdictions to avoid costly and time consuming litigation under Section 2, 42 U.S.C. § 1973.

I. THE BURDENS IMPOSED BY SECTION 5 ON COVERED JURISDICTIONS ARE NOT ONEROUS.

This Court has described the Voting Rights Act as an intrusion on state sovereignty. *See Lopez v. Monterey County*, 525 U.S. 266, 284 (1999). With respect to the preclearance requirements of Section 5, any such intrusion is slight. The Amici States do not believe the requirements of Section 5 to be burdensome or onerous. Rather, our experience demonstrates that the preclearance requirements of Section 5 do not impose undue costs or delays on covered jurisdictions.

The Section 5 administrative review process is designed "to be an expeditious, cost-effective alternative to the Section 5 declaratory judgment process." Civil Rights Division, United States Department of Justice, *About Section 5 of the Voting Rights Act* (www.usdoj.gov/crt/voting/sec_5/making.php). The Amici States have found this to be true.

The process for submitting a preclearance request is not complicated. The procedures for making a submission are set out in clear and precise terms. 28 C.F.R. § 51.1 *et seq.* (2008). The procedures are straightforward and are written in easy to understand language. These procedures are readily available on the Internet to state and local government attorneys, election law officials and the interested public. Civil Rights Division, United States Department of Justice, *Procedures for the Administration of Section 5 of the Voting Rights Act* (www.usdoj.gov/crt/voting/28cfr/51/28cfr51.php).

As Congress is well aware, the United States Department of Justice went to great lengths to ensure that the submission procedures would not burden States. Concerns of state and local officials were taken into account when DOJ drafted its preclearance procedures. *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 64 (2006) (*The Continuing Need*) (testimony of Anita S. Earls, Univ. of N.C.). As a result, the procedure for making a preclearance submission is "the most streamlined administrative process known to the federal government." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary,* 109th Cong., 2d Sess. 182 (2006) (*Understanding the Benefits and Costs*) (testimony of Armand Derfner, civil rights attorney, Charleston, SC). States and their political subdivisions, for example, may even make preclearance submissions electronically over the Internet. Civil Rights Division, United States

Department of Justice, *How To File An Electronic Submission Under Section 5 of the Voting Rights Act* (http://wd.usdoj.gov/crt/voting/sec_5/evs/). Moreover, DOJ is committed to working with state and local governments to make the preclearance process work. DOJ has an excellent working relationship with state and local election officials in the covered jurisdictions. *The Continuing Need* 64 (testimony of Anita S. Earls); *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary,* 109th Cong., 2d Sess. 310 (2006) (*Policy Perspectives*) (testimony of Donald M. Wright, Gen. Counsel, N.C. Bd. of Elections).

The information that must be provided in connection with a preclearance submission is relatively simple. The covered jurisdiction must provide: a copy of the statute, ordinance or procedure being changed; a copy of the proposed statute, ordinance or procedure; an explanation of the differences between the two if not readily apparent from the face of the documents; contact information for the person making the submission; the name of the jurisdiction making the submission; the statutory or other authority that provides the authority for making the change; the date of adoption; the effective date of the change; a statement that the change has not yet been enforced; the reasons for the change; the anticipated effect on minority voters; identification of all litigation concerning the change; and a statement that the prior

practice has been precleared.[1] 28 C.F.R. § 51.27 (2008). As a result, the vast majority of submissions can be prepared relatively quickly with little effort beyond the work necessary to make the election law change in the first place.

In considering whether to reauthorize Section 5, Congress was made aware that although several States expressed initial resistance to the preclearance process when the Voting Rights Act was originally adopted, by 2006 the process for seeking preclearance had become painless and routine for States. The time and cost to make a preclearance submission is relatively small. As one state election law official explained to Congress, the average submission (excluding redistricting and annexations) requires less than one hour of personnel time to prepare. *Policy Perspectives* 313 (testimony of Donald M. Wright). Some, though not all, submissions may be completed in a few minutes. *Id.* Except for redistricting and annexation submissions, the cost to the covered jurisdiction is "insignificant." *Id.* As another witness explained, "[t]he task of preparing the submission is usually a fraction of the work involved in making the voting change." *Understanding the Benefits and Costs* 182 (testimony of Armand Derfner). The effort necessary to complete a preclearance submission is far less than that required by many other state and federal regulations. *Id.* at 81. Preparing a preclearance submission is not difficult. *Id.* at 25

[1] Certain additional information must be provided in connection with redistricting, annexation or when requested by the Attorney General. 28 C.F.R. § 51.27(q), (r) (2008).

(testimony of Fred D. Gray, civil rights attorney, Montgomery, AL). Rather, it is "a small administrative act." *Id.*

Although the submissions in connection with redistricting or annexation require more than a few minutes to complete, the work that is necessary to support such a submission is prudent for all jurisdictions (regardless of whether they are covered by Section 5) in order to ensure compliance with Section 2. If, for example, a State has not evaluated its proposed redistricting plan against the factors set out in this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), the State faces a risk that the redistricting plan will be challenged under Section 2. Consequently, when preparing redistricting plans, most States conduct rigorous statistical analyses of their proposed redistricting plans before a final plan is adopted. Such a statistical analysis – which is routine in virtually any redistricting – is generally sufficient to complete the Section 5 preclearance submission. *See* 28 C.F.R. §§ 51.27(q), 51.28 (2008). Thus, even with respect to redistricting and annexation submissions, the preclearance requirements do not impose a substantial burden on States. Moreover, the work required to complete the submission is minuscule when compared to the importance of redistricting to the States and their citizens.

Not only is the monetary cost to States in complying with Section 5 *de minimis*, the intrusion on state sovereignty as a result of delay in implementing state election law changes is also minimal. The experience of the Amici States is that the United

States Department of Justice acts expeditiously in processing Section 5 submissions. This is borne out by both the DOJ's procedures and the testimony presented to Congress. The regulations governing Section 5 preclearance place a 60-day deadline on DOJ to act.[2] 28 C.F.R. § 51.42 (2008). Moreover, the procedures expressly permit a covered jurisdiction to request expedited review when a response is needed in less than 60 days. 28 C.F.R. § 51.34 (2008). DOJ has diligently responded to requests for expedited review. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary,* 109th Cong., 2d Sess. 354 (2006) (*Legislative Options*) (statement of Dana M. Oliver, General Registrar, Salem, VA); *Policy Perspectives* 123 (testimony of Donald M. Wright). As one witness explained, "[t]he administrative process is swift. A change has to be precleared within 60 days, and in some cases, it can be pre-cleared almost overnight." *Understanding the Benefits and Costs* 10 (testimony of Armand Derfner).

Given the streamlined and routine nature of Section 5 submissions, it is not surprising that the majority of election law officials in covered jurisdictions do not find Section 5 to be burdensome. *The Continuing Need* 64 (testimony of Anita S. Earls)

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[2] If the covered jurisdiction does not submit adequate information, however, DOJ may request additional information, thereby extending the 60-day period. 28 C.F.R. § 51.37 (2008).

(noting that most election law officials do not find Section 5 to be burdensome); *see Legislative Options* 354 (statement of Dana M. Oliver) (local election official noted that preclearance submissions are "routine and not a huge burden"); *Understanding the Benefits* 195 (statement of Senator Patrick J. Leahy) ("Section 5 is supported by many local officials in covered jurisdictions . . . ."). Before Congress, the General Counsel for the North Carolina Board of Elections testified that "[m]ost of the North Carolina covered jurisdictions do not see Section 5 preclearance as a burden, it has become a routine administrative matter taking little time or expense to comply with." *Policy Perspectives* 115 (testimony of Donald M. Wright); *see The Continuing Need* 64 (testimony of Anita S. Earls).

"[M]any of the costs and inconveniences [of Section 5] are overstated." *Policy Perspectives* 142 (testimony of Debo P. Adegbile, NAACP Leg. Def. & Ed. Fund). This is true in substantial part because much of the work that is needed to prepare a submission has already been done in connection with the original determination to make an election law change. The preparation of the preclearance submissions "is typically a tiny reflection of the work, thought, planning, and effort that had to go into making the change to begin with." *Understanding the Benefits and Costs* 10 (testimony of Armand Derfner). The Amici States agree with the repeated testimony before Congress that the administrative burden of complying with Section 5 is not great. *See*, *e.g.*, *id*.

In fact, the record in this case proves this very point. The Appellant's cost of complying with Section 5 is $223 per year. *See* J.S. App. 152. In contrast, the Appellant's cost to bind and print the Joint Appendix alone was $16,667. Invoice of Cockle Printing Co. (received by the Clerk of the United States Supreme Court on Mar. 18, 2009). This sum would cover the costs of the Appellant's preclearance submissions for well in excess of seven decades. Thus, the burden of complying with Section 5 is far less for the Appellant than the burden of complying with Supreme Court Rule 26.

Section 5 does not impose appreciable burdens on covered jurisdictions. A covered jurisdiction may adopt any election change that does not have a discriminatory effect or discriminatory purpose. Covered jurisdictions are merely required to carry the burden of proving this before such a change takes effect. Section 5 stands as an effective and cost-efficient means to ensure that discriminatory changes are not adopted in covered jurisdictions. The costs and obligations imposed by Section 5 on covered jurisdictions are not onerous.[3]

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[3] Appellant also asserts that Section 5 "imposes a scarlet letter on residents of covered jurisdictions." Appellant's Br., p. 58. This argument has no factual basis. Few people, other than judges, scholars and public officials, are even aware of which jurisdictions are covered. Additionally, designation as a covered jurisdiction is neither punitive nor inescapable. Under the bailout provisions, the designation can be removed if current circumstances allow the covered jurisdiction to meet the criteria of 42 U.S.C. § 1973b.

II. THE BENEFITS TO COVERED JURISDICTIONS RESULTING FROM THE PRECLEARANCE PROCESS MUST NOT BE IGNORED.

As set out in the record before Congress, the preclearance process substantially benefits covered jurisdictions. These benefits must not go ignored in considering whether Congress acted appropriately in extending the provisions of Section 5.

First, the preclearance process substantially benefits Section 5 States by encouraging the input of minority voters at an early stage of a State's efforts to change its election practices and procedures. *Policy Perspectives* 125 (testimony of Donald M. Wright) (Section 5 forces covered jurisdictions "to focus early in the process of determining voting/election actions upon the possible effect of the action upon minorities."). The preclearance submission must include a statement of "the anticipated effect of the change on members of racial or language minority groups." 28 C.F.R. § 51.27(n) (2008); *see The Continuing Need* 141 (testimony of Anita S. Earls). In order to provide such a statement, covered jurisdictions almost universally consult with minority voters before making an election law change. As a result of such minority involvement, covered jurisdictions are much better situated than non-covered jurisdictions in ferreting out, at an early stage in the process, proposed changes that would have a discriminatory effect on minority voters. Additionally, by including minority voters in the process, the final enactment is much less likely to result in divisiveness among racial groups.

As a result of Section 5, "minority voters have a greater involvement in decisions about election procedures as they are being made." *The Continuing Need* 22 (testimony of Anita S. Earls). In a covered jurisdiction, for example, election officials typically will consult with minority voters before moving a polling place.[4] This dialog strengthens communities and helps ensure that "harmful effect[s] on minority voters are stopped." *Id.* at 141. Such consultations do not typically occur in non-covered jurisdictions, even though they should. *See id.* at 22. In short, Section 5 "plays an important educative function in covered jurisdictions." *Policy Perspectives* 141 (testimony of Debo P. Adegbile). The communication that flows from a preclearance submission "facilitates public awareness and compliance with the law even short of the provision's affirmative deterrence effects." *Id.*

Second, Section 5 both prevents discrimination and helps protect covered jurisdictions against allegations of discrimination – an immeasurable benefit to covered jurisdictions.[5] *Policy Perspectives*

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[4] Appellant speaks of moving polling places as a trivial matter that does not need fly-specking by DOJ. Appellant's Br., p. 14. Moving a polling place from a building that is known and readily accessible by minorities to a building operated by a fraternal organization with a history of segregation can significantly diminish minority turnout. *Policy Perspectives* 54 (testimony of Debo P. Adegbile); *see* J.S. App. 181-83.

[5] As a result, it is not uncommon for jurisdictions that are not covered by Section 5 to inquire whether it is possible to submit their election law changes to DOJ for

124 (testimony of Donald M. Wright). As one election law official noted, review by DOJ helps to shield the covered jurisdiction from discrimination claims. *Policy Perspectives* 115 (testimony of Donald M. Wright); *see also The Continuing Need* 64 (testimony of Anita S. Earls) (Preclearance allows local election law officials to "deflect criticism by minority voters by pointing out that the redistricting plan, or polling place change, for example, had been precleared by the Department of Justice."); 1 *Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. 66 (2006) (testimony of J. Gerald Hebert, former Acting Chief, Civil Rights Div., U.S. Dep't of Justice) ("A lot of jurisdictions like section 5 preclearance and like to get a stamp of approval from the Justice Department that their voting system is non-retrogressive."). The opportunity for a State or local government to obtain such a review from the federal government is a "rarity in our federal system of government and should be viewed in a positive light." *Policy Perspectives* 115 (testimony of Donald M. Wright). Moreover, because preclearance tends to prevent discriminatory changes from even being proposed, both the covered jurisdiction and its citizens are benefitted. *See The Continuing Need* 6 (testimony of Pamela S. Karlan, Stanford Univ. Sch. of Law) (discussing deterrent effect of Section 5); 1 *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d

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preclearance.

Sess. 19 (2006) (testimony of Nadine Strossen, President, ACLU) (noting that Section 5 has prevented implementation of discriminatory voting changes); *Understanding the Benefits and Costs* 4 (testimony of Fred D. Gray) (noting deterrent effect).

Third, the preclearance process helps States to prevent costly Section 2 litigation. As noted above, the preclearance process serves to prevent covered jurisdictions from implementing discriminatory voting changes. Additionally, although Section 5 preclearance does not render a State immune from litigation, it provides an objective review of a State's election law changes. That process serves to diminish the likelihood of litigation challenging those election law changes. Thus, Section 5 is a cost-effective means of preventing litigation. *See Policy Perspectives* 141 (testimony of Debo P. Adegbile). Many, if not most, of DOJ's objections therefore represent potential Section 2 claims that have been averted. *Id.*

Section 2 litigation is extremely costly for States. *The Continuing Need* 15 (testimony of Pamela S. Karlan) (noting that Section 2 litigation is costly, requiring "huge amounts of resources in the litigation process"). Section 2 cases stand among the most complex litigation matters brought in federal court. *Understanding the Benefits and Costs* 181 (testimony of Armand Derfner). These claims require detailed expert testimony and an enormous amount of attorney time. *Id.* Such litigation frequently takes years to resolve. As a result, Section 2 litigation is extraordinarily expensive. Moreover, if the State does not prevail, it will face a substantial claim for

attorneys' fees under 42 U.S.C. § 1988. *See*, *e.g.*, *Barnett v. City of Chicago*, 122 F. Supp. 2d 915 (N.D. Ill. 2000) (awarding $7,271,759 in attorneys' fees and expenses); *Jeffers v. Tucker*, 835 F. Supp. 1101 (E.D. Ark. 1993) (reducing award of attorneys' fees and expenses from $1,034,492 to $725,747). Section 5 helps States to avoid such costly litigation. *The Continuing Need* 14-15 (testimony of Anita S. Earls); *Policy Perspectives* 120 (testimony of Donald M. Wright). The preclearance process of Section 5 is much more cost efficient and far less burdensome than Section 2 litigation.

The benefits of Section 5 greatly exceed the minimal burdens that Section 5 may impose on States and their political subdivisions. Congress appropriately concluded that the provisions of Section 5 should continue in place.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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